Supreme Court, U. S.
FILED
MAR 31 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1337

MICHELE SINDONA,

Petitioner,

v.

LAURENCE A. TISCH, LAWTON GENERAL CORPORATION, LOEW'S THEATRES INC., TISCH HOTELS, INC., LOEWS CORPORATION, LOEW'S HOTELS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT M. WACHTELL
WACHTELL, LIPTON, ROSEN & KATZ
299 Park Avenue
New York, New York 10017
Tel. No.: (212) 371-9200
Attorneys for Respondents

STEVEN M. BARNA
LAWRENCE B. PEDOWITZ
KENNETH B. FORREST
Of Counsel

TABLE OF CONTENTS

PAGE

Question Presented 1

Statement of the Case 2

REASONS FOR DENYING THE WRIT—

This case is distinguishable on its facts from the allegedly conflicting decisions cited by petitioner. It was decided correctly and in accord with the decisions of this Court. 7

CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

Baxter v. *Palmigiano,* 425 U.S. 308 (1976) 15n

Bramble v. *Kleindienst,* 357 F. Supp. 1028 (D. Colo. 1973), *aff'd sub nom. Bramble* v. *Richardson,* 498 F.2d 968 (10th Cir.), *cert. denied sub nom. Bramble* v. *Saxbe,* 419 U.S. 1069 (1974) 7n

Campbell v. *Gerrans,* 592 F.2d 1054 (9th Cir. 1979) 14-15

Chase Securities Corp. v. *Donaldson,* 325 U.S. 304 (1945) 10n

Galante v. *Steel City National Bank,* 66 Ill. App. 3d 476, 384 N.E.2d 57 (App. Ct. 1978), *cert. denied,* 100 S. Ct. 80 (Oct. 1, 1979) 7, 14

Gardner v. *Broderick,* 392 U.S. 273 (1968) 15n, 16n

Garrity v. *New Jersey,* 385 U. S. 493 (1967) 5, 15-16

PAGE

General Dynamics Corp. v. *Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974) 7n, 8n, 14, 17n

Jones v. *B.C. Christopher & Co.*, 466 F. Supp. 213 (D. Kan. 1979) 14

Justice v. *Laudermilch*, 78 F.R.D. 201 (M.D. Pa. 1978) 15

Kisting v. *Westchester Fire Insurance Co.*, 290 F. Supp. 141 (W.D. Wis. 1968), *aff'd on opinion below*, 416 F. 2d 967 (7th Cir. 1969) 7n

Lefkowitz v. *Cunningham*, 431 U.S. 801 (1977) 5, 15n

Lefkowitz v. *Turley*, 414 U.S. 70 (1973) 15n

Link v. *Wabash R.R. Co.*, 370 U.S. 626 (1962) 10n

Lyons v. *Johnson*, 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970) 7n, 13-14, 14-15

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) 10n, 17n

Societe Internationale v. *Rogers*, 357 U.S. 197 (1958) 16n, 17n

Spevack v. *Klein*, 385 U.S. 511 (1967) 5, 15-16

Uniformed Sanitation Men Association v. *Commissioner of Sanitation*, 392 U.S. 280 (1968) 15n

United Artists Corp. v. *Freeman*, 605 F.2d 854 (5th Cir. 1979) 12n

United States v. *Kordel*, 397 U.S. 1 (1970) 17n

United States ex rel. Laino v. *Warden of Wallkill Prison*, 246 F. Supp. 72 (S.D.N.Y. 1965), *aff'd*, 355 F.2d 208 (2d Cir. 1966) 8n

PAGE

United States v. *Malnik*, 489 F.2d 682 (5th Cir.), *cert. denied*, 419 U.S. 826 (1974) 8n

United States v. *Pierce*, 561 F.2d 735 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978) 8n

United States v. *Solomon*, 509 F.2d 863 (2d Cir. 1975) 15, 15n

United States v. *Solon*, 294 F. Supp. 880 (E.D.N.Y.), *aff'd*, 405 F.2d 1211 (2d Cir. 1968) 8n

Wehling v. *Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979), *reh. denied*, 611 F.2d 1026 (5th Cir. 1980) 11-14, 13n

Rule:

United States Court of Appeals for the Second Circuit, Rules Relating to the Organization of the Court § 0.23 ..... 5n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1337

MICHELE SINDONA,

Petitioner,

v.

LAURENCE A. TISCH, LAWTON GENERAL CORPORATION, LOEW'S THEATRES INC., TISCH HOTELS, INC., LOEWS CORPORATION, LOEW'S HOTELS, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents Laurence A. Tisch, Lawton General Corporation, Loew's Theatres Inc., Tisch Hotels, Inc., Loews Corporation and Loew's Hotels, Inc. submit this Brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit of petitioner Michele Sindona.

Question Presented

Did the Court of Appeals correctly hold that, on the facts and circumstances of this case, the plaintiff—who is himself the critical witness in this action—could not continue to maintain his action, brought on the last day of a six-year statute of limitations, while refusing to answer any deposition questions or produce documentary evidence on the basis of a claim of Fifth Amendment privilege?

Statement of the Case

Plaintiff-petitioner Michele Sindona ("Sindona") commenced this action in the United States District Court for the Southern District of New York on July 10, 1978, the last day prior to the expiration of the applicable six-year statute of limitations. The complaint charged that defendants-respondents ("respondents") — Loews Corporation, certain of its present and former subsidiaries and affiliates and Laurence A. Tisch, its chief executive officer—made "fraudulent omissions" and misrepresentations of fact concerning the condition of Franklin New York Corporation and of its subsidiary Franklin National Bank during negotiations which culminated in a sale in July 1972 of Franklin shares by two Loews subsidiaries to a company wholly owned by Sindona.*

Shortly after Sindona's action was filed, respondents—who contend that Sindona's allegations of fraud are spurious—served him with a notice of deposition and request for document production. Sindona produced a few largely irrelevant documents (previously ordered produced to the Securities and Exchange Commission in another action), but objected to further production of all categories of documents requested, claiming the privilege against self-incrimination. The apparent basis for the assertion of privilege was that Sindona had been informed by the United States Attorney for the Southern District of New York that he was the target of a criminal investigation relating to his activities at Franklin.

Rather than appear for his deposition, Sindona moved for a protective order "staying all discovery against [him]

* Except where differentiation is necessary, this Brief will use "Franklin" to refer to both Franklin New York Corporation and its banking subsidiary.

for a period of ninety (90) days" on the stated ground that an upcoming trial against certain other former Franklin officers, *United States* v. *Gleason, et al.*, 78 Cr. 522 (TPG) (S.D.N.Y.), would clarify the status of any criminal investigation of him. The District Court granted the stay, over respondents' objection, specifying that its duration would be "90 days from the date of [the] order or 30 days after the conclusion of the trial in *U.S.* v. *Gleason, et al.* whichever is sooner." The Court concluded that a stay of such limited duration would not be prejudicial to respondents.

On the very day the stay expired, Sindona's counsel applied for an extension of the stay. Respondents opposed on the basis of their previously expressed position that Sindona was in reality seeking an indefinite stay of discovery—to respondents' manifest prejudice. District Judge Carter, recognizing the prejudice to respondents which would result from the essentially open-ended stay now being sought by Sindona, denied Sindona's application in a letter to Sindona's counsel which, notably, does not appear among the exhibits to the Petition:*

> I am somewhat disturbed by your request of February 22, because it tends to confirm defendants' suspicion that you are really seeking an indefinite stay of discovery and makes manifest that it was a mistake to grant your initial request. At any rate, the defendants should not be under any indefinite prohibition against proceeding with discovery, particularly in a case where your client has initiated the litigation.
>
> My order of January 8th past has now expired on its own terms and the court does not propose further

* Judge Carter's letter is submitted as Exhibit A, Addendum hereto.

to interfere with defendants' right to depose your client.

On March 6, 1979, Sindona appeared for his deposition. After providing his name and address and identifying himself as the plaintiff, Sindona refused, on Fifth Amendment grounds, to answer each and every question put to him, including inquiries concerning the factual basis for his own complaint. For example:

> Q. Did you personally have any communication with Laurence A. Tisch of Loew's Corporation or any other representative of Loew's Corporation prior to July 11, 1972, with respect to any transaction involving a sale or purchase of shares of Franklin New York Corporation?
>
> A. The same answer. I decline to answer.

Sindona's counsel expressly stated that Sindona would continue to assert the privilege against self-incrimination as to *all* relevant questions.

On April 6, 1979, upon respondents' motion to compel discovery, the District Court issued an opinion and Order reviewing the pertinent authorities and requiring Sindona to comply with respondents' relevant discovery requests or face dismissal of his action. See Appendix C to Petition. During the pendency of respondents' motion, on March 19, 1979, Sindona had been indicted for activities relating to Franklin.*

On April 27, 1979, Sindona again appeared for his deposition. After Sindona's counsel acknowledged that Sindona

* The charges in the Southern District of New York indictment against Sindona related to only two of the numerous issues in this civil action: whether the $40 million he paid Loews subsidiaries for Franklin stock was actually his; and whether Sindona's own unlawful acts at Franklin were the ultimate cause of Franklin's demise and the alleged loss of his investment in Franklin.

was fully cognizant of the District Court's Order, counsel for respondents sought to put questions going to the material issues in Sindona's action: fraud, reliance, causation, damages. Sindona declined, on Fifth Amendment grounds, to answer each and every question. The deposition concluded with the concession by Sindona's counsel that Sindona would persist in his refusal to answer any and all relevant questions put to him or to produce documents.

Upon motion by respondents, the District Court then dismissed Sindona's action. An Order and Judgment dismissing the case was entered on June 7, 1979.

Sindona appealed to the United States Court of Appeals for the Second Circuit which, on October 31, 1979, unanimously affirmed the District Court's decision.* The Court of Appeals recognized the patent unfairness to respondents of requiring them to wait indefinitely for an opportunity to obtain relevant evidence from the plaintiff—the most crucial witness in the action—in a case relating to a transaction almost seven years old at the time of dismissal:

> In the instant case, plaintiff's right to invoke the Fifth Amendment must be weighed against the injustice to the civil defendants. In that regard this case is distinguishable from recent Supreme Court decisions guaranteeing the right to invoke the Fifth Amendment without penalty. *See Spevack* v. *Klein,* 385 U.S. 511 (1967); *Garrity* v. *New Jersey,* 385 U.S. 493 (1967); *Lefkowitz* v. *Cunningham,* 431 U.S. 801 (1977). In view of the fact that plaintiff Sindona refused to answer any

* The Second Circuit's opinion was in the form of a brief written statement appended to a summary order of affirmance. Such opinions are unreported and "shall not be cited or otherwise used in unrelated cases before [the Second Circuit] or any other court." See United States Court of Appeals for the Second Circuit, Rules Relating to the Organization of the Court § 0.23.

substantive questions during discovery, we hold that the district court correctly concluded that the balance of justice here tipped in favor of protecting the civil defendants. . . .

We hold that the district court did not abuse its discretion in either denying Sindona's motion for a stay of discovery procedures or dismissing the complaint. Again, the court weighed the possible injustice to the civil defendants against plaintiff's need for protection, and decided that the scales tipped in defendants' favor. The court had sound reasons for acting as it did.

• • •

Both the District Court and the Court of Appeals recognized that dismissal was the only viable alternative under the particular facts and circumstances of this case. For any further delay would have been highly prejudicial to respondents—already in the unenviable position of having to defend against alleged multi-million dollar fraud claims based on oral negotiations which took place in 1972. As will be shown herein, any court faced with similar facts and circumstances would have likewise properly decided in favor of dismissal. Consequently, review of this case by this Court is unwarranted.

REASONS FOR DENYING THE WRIT

This case is distinguishable on its facts from the allegedly conflicting decisions cited by petitioner. It was decided correctly and in accord with the decisions of this Court.

There is no conflict among the circuits as to the power of a District Court to dismiss an action on the basis of a plaintiff's refusal, on Fifth Amendment grounds, to make discovery. All Courts of Appeals which have confronted this issue—including those in the cases relied on by petitioner Sindona—have recognized that dismissal is, in appropriate circumstances, an entirely proper remedy for defendants deprived of discovery by a plaintiff's assertion of the Fifth Amendment privilege.*

It may be noted that earlier this Term this Court denied a Petition for a Writ of Certiorari of civil plaintiffs whose complaint had been dismissed by a state court for their refusal, on Fifth Amendment grounds, to make discovery. *Galante* v. *Steel City National Bank,* 66 Ill. App. 3d 476, 384 N.E.2d 57 (App. Ct. 1978), *cert. denied,* 100 S. Ct. 80 (Oct. 1, 1979). The petitioners in *Galante,* like Sindona, argued that the decision of the lower court was contrary to the precedents of this Court.

---

* In addition to the instant case and the cases cited by petitioner (which are discussed herein), see, *e.g., Lyons* v. *Johnson,* 415 F.2d 540, 541-42 (9th Cir. 1969), *cert. denied,* 397 U.S. 1027 (1970); *General Dynamics Corp.* v. *Selb Manufacturing Co.,* 481 F.2d 1204, 1213-14 (8th Cir. 1973), *cert. denied,* 414 U.S. 1162 (1974); *Bramble* v. *Kleindienst,* 357 F. Supp. 1028, 1035-36 (D. Colo. 1973), *aff'd sub nom. Bramble* v. *Richardson,* 498 F.2d 968, 973 (10th Cir.), *cert. denied sub nom. Bramble* v. *Saxbe,* 419 U.S. 1069 (1974); *Kisting* v. *Westchester Fire Insurance Co.,* 290 F. Supp. 141, 149 (W.D. Wis. 1968), *aff'd on opinion below,* 416 F.2d 967 (7th Cir. 1969).

The propriety of dismissal thus must turn upon the circumstances of the particular case. The facts of this particular case which establish the propriety of dismissal include the following:

1. The Courts below were faced with a total refusal by Sindona to give any deposition testimony whatsoever;*
2. Sindona's refusal to give any deposition testimony was coupled with a virtually total refusal to make any document production;
3. There was no suggestion that respondents were in any way acting in concert with the Government. Indeed, in the District Court, Sindona ignored the possibility—raised by respondents—of submitting to discovery subject to a confidentiality order shielding Sindona's testimony and documents from being made available to the Government. At oral argument, the Court of Appeals itself suggested that Sindona submit to discovery subject to such a confidentiality order. Sindona's counsel declined;

*Not only was this wholesale refusal by its very nature of dubious validity given the requirement long imposed by law that the claim of privilege be asserted on a question-by-question basis, see, *e.g.*, *United States* v. *Pierce*, 561 F.2d 735, 741-42 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978); *United States* v. *Malnik*, 489 F.2d 682, 685-86 (5th Cir.), *cert. denied*, 419 U.S. 826 (1974); *General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F.2d 1204, 1212, 1213 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *United States* v. *Solon*, 294 F. Supp. 880, 882 (E.D.N.Y.), *aff'd*, 405 F.2d 1211 (2d Cir. 1968); *United States ex rel. Laino* v. *Warden of Wallkill Prison*, 246 F. Supp. 72, 80 (S.D.N.Y. 1965), *aff'd*, 355 F.2d 208 (2d Cir. 1966), but it was by no means factually clear that all areas of potential inquiry—as to the issues raised by a complaint claiming that Sindona was a *victim* of "fraud" supposedly committed by others—would necessarily have been self-incriminating in nature.

4. The action was not brought by Sindona until the last day of a six-year limitation period. Having commenced the action, Sindona then repeatedly sought stays of the District Court and, when ultimately refused further stay, refused to make discovery;*
5. Sindona himself was the single critical witness who had personally negotiated the transaction at issue with respondents and had unique knowledge of the facts. The record showed that it was impossible for respondents to ascertain Sindona's claims and investigate their defense without the benefit of his testimony. When dismissed, the case related to events which were seven years old. Further delay would have continued to compound the prejudice to respondents;**

*Petitioner's counsel likewise repeatedly sought to delay the proceedings in the Court of Appeals, requesting—on the ground that Sindona had disappeared and had apparently been kidnapped—an indefinite suspension of the appeal "pending clarification of Mr. Sindona's whereabouts and status," *e.g.*, Petitioner's Second Circuit Brief, pp. 1-2, n.1. Documentation since presented by the Government during Sindona's criminal trial indicated that Sindona's "kidnapping" story had been a hoax and that Sindona, in fact, had travelled to Europe under an assumed name. See N.Y. Times, March 7, 1980, § 2, at 2, col. 3.

**The statement in Sindona's petition that "[r]espondents did not make any factual showing in the district court that a stay of discovery would prejudice their defense of this action" is incorrect. See Petition, p. 14. Respondents repeatedly emphasized below that they would indeed be prejudiced by extensive delay in a case whose central facts were already six years old when finally commenced, where the substance of oral negotiations would be the main focus of the case and where witnesses' memories were likely to fade significantly as more and more time went by. See, *e.g.*, Affidavit of Herbert M. Wachtell, sworn to December 4, 1978 ¶¶ 6-9; Respondents' Memorandum of Law, dated December 4,

6. Sindona's refusal to make discovery, given his unique status as a witness, brought the litigation to an effective halt. Indeed, it was conceded on behalf of Sindona in the Court of Appeals that his refusal to testify made it impossible for any trial to go forward. Petitioner's Second Circuit Reply Brief, p. 8;*

7. Sindona's claim of "fraud" had been asserted against highly reputable corporate and individual persons who, because of his refusal to give testimony, were being deprived of *their* right to have a prompt adjudication of its lack of merit before "memories have faded, witnesses have died or disappeared, and evidence has been lost";**

1978, p. 13. See also Respondents' Second Circuit Brief, pp. 29-30, 39-41.

As respondents pointed out below, Sindona's refusal to make discovery prevented them from learning the very nature of the "fraud" being alleged; from ascertaining the identity of persons having pertinent knowledge; from discovering the existence of documentary evidence. Respondents simply could not meaningfully begin their task of locating witnesses and documents to rebut plaintiff's claims—whatever they might have been—without first knowing Sindona's own story.

* Prior to Sindona's refusal to testify, the District Court had issued a Pre-Trial Schedule Order requiring that *all* discovery in the action be completed by April 30, 1979. Sindona's refusal to testify had the effect of rendering this Order a nullity and, if countenanced, would have permitted Sindona to arrogate to himself an indeterminate stay of proceedings—the very stay which had been denied by the District Court. It has of course long been settled that a District Court has virtually unfettered discretion to control its own calendar and to dismiss an action for want of prosecution. See, *e.g.*, *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962). See also *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976).

** *Chase Securities Corp.* v. *Donaldson*, 325 U.S. 304, 314 (1945) (setting forth a rationale underlying statutes of limitations). Indeed, in light of the concession on behalf of Sindona in the District Court that he intentionally refrained from commencing the action

8. There was "no light at the end of the tunnel." Although pointing to the then forthcoming criminal trial as a predicate for Sindona's refusal to testify, at no time was Sindona's counsel prepared to represent that Sindona would have any willingness to testify once that trial was completed. To the contrary, the record before the District Court showed Sindona's counsel asserting the categorical position that Sindona would not testify at a deposition in the action for so long as there was any jeopardy of a criminal prosecution relating to Franklin against him.* And when asked, upon oral argument before the Second Circuit, to state when his client would be willing to submit to discovery, Sindona's counsel declined to make any representation to the Court.

It was on these facts that the Courts below "concluded that the balance of justice here tipped in favor of protecting the civil defendants." Yet Sindona argues that because the Fifth Circuit reversed as "premature" a District Court's dismissal of a private libel action against CBS in *Wehling*

prior to the final day of the six-year limitation period for the very reason that he was *not* prepared to prosecute the case, Sindona's act in "commencing" the action was an empty formalism designed to toll the statute of limitations. In repeatedly asking for stays of proceedings, Sindona was in fact requesting a *de facto* extension of the statute of limitations itself.

* As respondents pointed out to the Court of Appeals, were the criminal trial to have ended in a hung jury, Sindona manifestly would not deem himself free from the potentiality of incrimination. And—as has now in fact eventuated, see N.Y. Times, March 28, 1980, § 1, at 1, col. 3—were Sindona convicted, he would no doubt appeal and continue to refuse to make discovery pending the outcome of that appeal (and any new trial which might be ordered). The Courts below were, therefore, being asked to countenance an indeterminate stay of proceedings in an action the events of which were already seven years old.

v. *Columbia Broadcasting System,* 608 F.2d 1084 (5th Cir. 1979), *reh. denied,* 611 F.2d 1026 (5th Cir. 1980), there is a conflict in the law between the Second and Fifth Circuits. This is not so. The two Courts applied a single, uniform legal standard — a balancing-of-interests approach — in reaching their ultimate decisions. The disparate results of the cases turned on the differing facts at bar.

Thus, the Fifth Circuit in *Wehling* held that the "balancing-of-interests approach ensures that the rights of both parties are taken into consideration before the court decides whose rights predominate" and expressly recognized that dismissal may indeed be warranted where "prejudice to defendant" is established.* 608 F.2d at 1088-89. The Second Circuit was in accord—holding in the instant case that "plaintiff's right to invoke the Fifth Amendment must be weighed against the injustice to the civil defendants."

The differing results of these two cases are explained by the following principal factual distinctions:

—In *Wehling,* the Fifth Circuit recognized that the criminal statute of limitations against the plaintiff (who had not been indicted) was to expire on September 1, 1980 —just eight months from the date of the Court's decision—and stayed discovery of potentially incriminatory material until that time. 608 F.2d at 1089. The Court expressly refused to stay discovery for the duration of any criminal proceeding against the plaintiff, recognizing that any such stay could be of indeterminate duration—to the distinct prejudice of the civil

* Indeed, less than two months before deciding *Wehling,* the Fifth Circuit ruled that under certain circumstances it would be permissible to enter a default judgment against a civil defendant who has asserted his Fifth Amendment privilege as to all deposition questions. *United Artists Corp.* v. *Freeman,* 605 F.2d 854, 857 (5th Cir. 1979).

defendant.* When the instant case was dismissed—seven years after the relevant facts—an indictment had just been brought against Sindona and there was no indication when, if ever, the criminal charges against him would be finally resolved (given the likelihood of adjournments of trial, appeals, hung juries and retrials, further indictments, etc.). In fact, as noted above, there was no assurance from Sindona's counsel that Sindona would make discovery even after the final determination of the present criminal charges against him;

—In *Wehling,* the plaintiff did make relevant discovery, but objected to 19 particular deposition questions and refused to testify as to one area of inquiry. 608 F.2d at 1086. Here, Sindona refused, in a wholesale fashion, to answer any deposition questions whatever and likewise refused to make production of documents. All federal courts which have dealt with the total refusal of a plaintiff (or counterclaiming defendant) to make relevant discovery have ruled that dismissal is appropriate under such circumstances. *Lyons* v. *Johnson,* 415 F.2d 540, 541-42 (9th Cir. 1969), *cert. denied,* 397

* Thus, in denying a petition for rehearing, the Fifth Circuit expressly held that dismissal *would* be warranted upon further delay attributable to the plaintiff's continued assertion of privilege during the pendency of criminal proceedings:

> Our opinion must not be read as requiring that the discovery stay be extended until the termination of all criminal proceedings, regardless of their duration. Although we have refused to presume that a three-year stay [commencing two years after the facts in issue] would necessarily prejudice CBS' efforts to defend against Wehling's [libel] claim, *we are aware that a point may be reached where the likelihood of prejudice is so great that the trial court would be justified in requiring plaintiff to either submit to discovery or forego his lawsuit.*
>
> —611 F.2d at 1027-28, n.* (emphasis supplied).

U.S. 1027 (1970); *General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F.2d 1204, 1213-14 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *Jones* v. *B.C. Christopher & Co.*, 466 F. Supp. 213, 224-27 (D. Kan. 1979). See also *Galante* v. *Steel City National Bank*, 66 Ill. App. 3d 476, 384 N.E.2d 57 (App. Ct. 1978), *cert. denied*, 100 S. Ct. 80 (Oct. 1, 1979); and

—In *Wehling*, there was strong evidence that defendant CBS had been actively cooperating with the Federal Government, in its efforts to prosecute the civil plaintiff, and with the Attorney General of Texas. 608 F.2d at 1086 & n.4. Thus, to permit discovery of plaintiff to go forward would have been tantamount to permitting *government* to compel testimony. In the instant action, this was simply not the case—there was never any intimation below that respondents were acting in conjunction with the Government and, indeed, they were not.

The other cases claimed by Sindona to "conflict" are also distinguishable. Thus, in *Campbell* v. *Gerrans*, 592 F.2d 1054 (9th Cir. 1979), the Court held that dismissal was inappropriate where the plaintiff asserted the Fifth Amendment privilege as to only four (of 34) interrogatories which the Court found "were of a highly questionable nature and appear on their face to raise Fifth Amendment problems." 592 F.2d at 1057. Clearly, the progress of the entire action in *Campbell* was not brought to a grinding halt as it was in the instant case by Sindona's wholesale refusal to make discovery. Indeed, the Ninth Circuit acknowledged the limited nature of its ruling in *Campbell* by expressly distinguishing *Lyons* v. *Johnson*, 415 F.2d 540 (9th Cir. 1969), *cert. denied*, 397 U.S. 1027 (1970), in which that same Court upheld the dismissal of an action for a plaintiff's "unyielding" and absolute refusal to testify. 592 F.2d at 1057. *Justice* v. *Laudermilch*, 78 F.R.D. 201 (M.D. Pa. 1978), in which only 13 isolated deposition questions were objected to by the plaintiff, is similarly distinguishable from the case at bar.

Moreover, the Second Circuit's decision here is fully in accord with the decisions of this Court. In support of his position, Sindona has sought to rely upon the line of cases commencing with *Garrity* v. *New Jersey*, 385 U.S. 493 (1967) and *Spevack* v. *Klein*, 385 U.S. 511 (1967).* However, in such cases, the inquisitor was *government itself*, seeking to compel incriminating testimony—in *Garrity*, in an investigative inquiry against police officers; in *Spevack*, in a disciplinary hearing against an attorney—and as this Court has subsequently made clear, it was that particular role of the *state* in actively initiating an attempt to compel incriminating testimony "by threats of serious economic reprisal" ** that is the basis of the *Garrity* line of cases. Those decisions thus lie close to the very core of the Fifth Amendment privilege—a privilege designed "to protect the individual in what was thought to be an unequal contest with the state," *United States* v. *Solomon*, 509 F.2d 863, 868 (2d Cir. 1975) (Friendly, J.)—and reflect understandable sensitivity to attempts by *government* as inquisitor to perform an end-run around the Fifth Amendment by imposing "devastating" penalties*** upon an involuntary witness if

---

* See also *Gardner* v. *Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Association* v. *Commissioner of Sanitation*, 392 U.S. 280 (1968); *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973); and *Lefkowitz* v. *Cunningham*, 431 U.S. 801 (1977).

** *Baxter* v. *Palmigiano*, 425 U.S. 308, 316-17 (1976).

*** See *United States* v. *Solomon*, 509 F.2d 863, 871 (2d Cir. 1975).

he refuses to waive his constitutional privilege and incriminate himself.*

The present case is quite different. For while it has of course been held that a party to a private civil action has the right to refuse to answer particular questions which may be incriminatory of him in some other proceeding, we are now at the penumbra of the Fifth Amendment's scope. Given a case such as that which is the subject of the present petition—where government is *not* the inquisitor; where critically relevant testimony is being sought by purely private adversaries in a civil litigation (*a fortiori*, adversaries who have involuntarily been thrust into that litigation as *defendants* by the very party who refuses to make discovery); where there is no suggestion that such adversaries are acting as a "stalking horse" for government—the Courts below quite properly recognized that respondents in this private civil case have rights which likewise are deserving of judicial recognition and protection and that this Court's precedents did not render a District Court powerless to grant necessary and appropriate relief. Nor is the dismissal of petitioner's lawsuit for failure to meet his normal obligations as a litigant on the same par as the penalty of loss of livelihood with which this Court was faced in cases such as *Garrity* and *Spevack*.**

• • •

* See, *e.g.*, *Gardner* v. *Broderick*, 392 U.S. 273 (1968) (dismissal of public employee *would* be permissible for refusal to "answer questions specifically, directly, and narrowly relating to the performance of his official duties"; vice was requirement "to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself"; it was "clear that petitioner's testimony was demanded before the grand jury in part so that it might be used to prosecute him, and not solely for the purpose of securing an accounting of his performance of his public trust." 392 U.S. at 278, 279.).

** Petitioner's reliance on certain other decisions of this Court is also misplaced. Thus, in *Societe Internationale* v. *Rogers*, 357 U.S. 197, 208-13 (1958), this Court held it unconstitutional to dismiss the action of a plaintiff for his refusal to produce documents. There, however, the plaintiff was "unable" to produce such documents since "compliance by disclosure of banking records [would have] itself constitute[d] the initial violation of Swiss laws." *Id.* at 211. The Court expressly distinguished the more pertinent factual setting in which the plaintiff is required to submit to discovery notwithstanding claims that compliance "will reveal facts which may provide the basis for criminal prosecution." *Id.*

In *United States* v. *Kordel*, 397 U.S. 1 (1970), the Court upheld the convictions of two officers of a corporation, where the District Court correctly decided *not* to stay a related civil proceeding pending completion of the criminal case. That decision, notwithstanding dicta cited by petitioner, provides no basis for the position of a plaintiff refusing all discovery on Fifth Amendment grounds.

In sum, neither this Court nor any Court of Appeals has ever held that a court lacks *power* to dismiss the complaint of a civil plaintiff refusing discovery on Fifth Amendment grounds. Here, the Second Circuit simply held that, on the particular facts and circumstances of this case, that power of the District Court was properly exercised.* There is no conflict among the circuits nor is the Second Circuit's decision in conflict with any prior precedent of this Court. Accordingly, the petition should be denied.

* See also *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642 (1976), a non-Fifth Amendment case, in which the Court, noting the discretionary nature of the District Court's decision, affirmed dismissal of the action of a plaintiff for his disobedience of a discovery order. In that decision, the Court relied upon the Eighth Circuit's decision in *General Dynamics Corp.* v. *Selb Manufacturing Co.*, 481 F.2d 1204 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974), which expressly upheld the dismissal of the compulsory counterclaim of a defendant asserting the Fifth Amendment privilege.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari of Michele Sindona should be denied.

Dated: New York, New York
March 31, 1980

Respectfully submitted,

HERBERT M. WACHTELL
WACHTELL, LIPTON, ROSEN
& KATZ
299 Park Avenue
New York, New York 10017
Tel. No.: (212) 371-9200
Attorneys for Respondents

STEVEN M. BARNA
LAWRENCE B. PEDOWITZ
KENNETH B. FORREST
Of Counsel

ADDENDUM

Exhibit A

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE ROBERT L. CARTER
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

February 26, 1979

Laurence V. Senn, Jr., Esq.
Mudge Rose Guthrie & Alexander
20 Broad Street
New York, New York 10005

RE: Sindona v. Tisch, et al, 78 Civ. 3102

Dear Mr. Senn:

I am somewhat disturbed by your request of February 22, because it tends to confirm defendants' suspicion that you are really seeking an indefinite stay of discovery and makes manifest that it was a mistake to grant your initial request. At any rate, the defendants should not be under any indefinite prohibition against proceeding with discovery, particularly in a case where your client has initiated the litigation.

My order of January 8th past has now expired on its own terms and the court does not propose further to interfere with defendants' right to depose your client.

Sincerely,

Robert L Carter

ROBERT L. CARTER

cc: Steven M. Barna, Esq.